

University of Groningen

False Accountability, Elusive Rule of Law

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DOI:
[10.17176/20180911-173723-0](https://doi.org/10.17176/20180911-173723-0)

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Document Version
Publisher's PDF, also known as Version of record

Publication date:
2018

[Link to publication in University of Groningen/UMCG research database](#)

Citation for published version (APA):

Kochenov, D. (2018, Sept 11). False Accountability, Elusive Rule of Law. Verfassungsblog on matters constitutional. <https://doi.org/10.17176/20180911-173723-0>

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False Accountability, Elusive Rule of Law

VB verfassungsblog.de/false-accountability-elusive-rule-of-law/

Dimitry Kochenov Di 11 Sep 2018

Di 11 Sep 2018



The tale of the ‘political Commission’ as a way to reinforce the accountability of this institution is a deeply misleading misrepresentation of a haphazard move bound to weaken the Union’s ability to meet the outstanding challenges touching upon its institutional core. Besides ruining the institutional architecture of the EU by effectively switching off the logic underpinning the principle of institutional balance, it reduces the credibility of the Commission in dealing with the legal-political crises in difficult areas on the fringes of the EU’s competences, touching upon the key aspects of the EU’s very rationale and *raison d’être*: its rule of law nature. I thus entirely agree with Mark Dawson that ‘by choosing to be “political”, the Commission has associated itself with politics at a time when that profession has its lowest ever level of public esteem’. Even more importantly, perceived politicization

has fundamentally undermined the EU's action in an area of most fundamental concern: its rule of law and democratic nature. The 'political Commission' will be remembered as an observer of the fading away of the idea of the EU as a strong Union of democracies.

In Bed with Bad Guys

It is not necessary to repeat the story of the authoritarian rise and the 'Rule of Law backsliding' in some of the EU's new Member States: The stories of Hungary and Poland are well known, as analyzed, most prominently, by [Kim Lane Scheppele](#) and [Laurent Pech](#) – just as the story of the [Failure of Conditionality](#): the Commission's epic fail over the years in the run-up to the EU's enlargement, to ensure that the European Union, in the words of Jan Klabbers, does not find itself "in bed with bad guys"¹) Jan Klabbers, "On Babies, Bathwater and the Three Musketeers, or the Beginning of the End of European Integration", in Veijo Heiskanen & Kati Kulovesi (eds.), *Function and Future of European Law* (Helsinki: Helsinki University Press, 1999), 279.. Well, this is exactly where we are and our monstrous lovers, having revealed their true (or renewed) nature, are not at all nicer than what we have feared. What is worse – and what the [Copenhagen criteria](#) pointed to with clarity ages ago – the EU's *acquis* – the consent rules in our bed with monsters – is not about the values at all. Should the *acquis* have been about democracy and the rule of law and other things nice as recounted in Article 2 TEU, the need for the Copenhagen political criteria next to the requirement of the strict observance of the *acquis* would in fact be very far from obvious: the criteria filled an important void and thereby affected the EU's constitutionalism in the deepest sense, as [Wojciech Sadurski](#) has shown. At the same time, neither the criteria nor the renewed *acquis* appear capable of defending the EU from the rape by the autocrats in the East. It is symbolic, in this sense, to turn to the newest – brilliant – [paper of Sadurski](#): Poland is gone, following Hungary.

The EU's Own Responsibility?

The failure of constitutionalism we are talking about is not only the fault of the non-compliant Member States. Clearly, it is the EU's fault too: the EU opened the gates of the internal market allowing the countries in question to benefit from the accompanying overwhelming economic boost, the EU created a true Marshall plan with dozens of billions of euros on the line in the last budget cycle, [supporting the *de facto* neo-Soviet](#) (albeit seemingly ideology-free) one-party regimes, and, crucially, the EU's new constitutionalism [did not offer any robust tools to deal with backsliding](#), a constant search for suitable instruments notwithstanding both from a [theoretical](#) and from a [black-letter/comparative](#) perspective. It is clear at this point, that we will have to live with our failure, waiting authoritarianism out, while hearing constant absurdities, insults and misrepresentations of facts from the [fake Polish judges](#) and the [corrupt Hungarian establishment](#). EU money is stolen and supports Klabbers' bad guys, just as the dignity of EU membership stands undermined. All this is supported, counterintuitively to some degree, by the very logic of the Monnet method: By creating an Internal Market in order to tie together the former enemies in a tight but inescapable embrace we make the costs of political conflict very high indeed. Any political moves against the Poles and the Hungarians potentially emerge as undesirable – so long, [Article 7](#)!

This is a difficult situation made markedly worse by the political support of the fight against our values enjoyed by some of those, whom the European institutions would be expected to fight. The tale of the European People's Party (EPP) losing face and decency by harbouring Orbán's kleptocracy is well known and does not need to be repeated here. What emerges with clarity, however, is that the EU is not only a highly atypical democracy (which democracy can there be without an ability to decide on its own ends as opposed to only the means in the face of the goals of integration pre-set in the Treaties?). It is also a non-existent militant democracy. Even worse. As per above, the EU is co-responsible for the ongoing rule of law failures: It supports autocracies financially, institutionally and politically, thus failing the main promise the new Member States hoped the EU would keep, i.e. to protect the new democracies from their own failures and deadly temptations. So much for the Union of values.

Political Pillow Talk

What is then the role of the "political Commission" in this troubling context? The answer is clear, based on the history of democratic backsliding in the federations elsewhere in the world, but also on the European Parliament and other institutions' miserable track-record in dealing with the autocracy problem.

Dan Kelemen's work outlining the glorification of racism and inequality in the Southern States of the US for the larger part of the 20th century, which America is still quite painfully dealing with in the context of Confederate monument removals and the deadly racial biases of the police is a vivid reminder that a federal democracy does not necessarily require that all the constituent part of the Union be democratic, no matter what the inspirational legal documents would imply. The US experience teaches us that the politicization of the federal centre could imply the stabilization of repugnant autocracies in the component parts. This story seems to be proven by the EPP's stance on Hungary in the European Parliament: politicization, in the absence of clear rule of law and democratic values espoused by the political party groups benefiting from this, means a *carte blanche* given to a government, however despicable, on the 'correct' side of the political spectrum. Combine this with the Monnet method in action mentioned above – i.e. the unavoidable national costs for any confrontational political decisions taken against the backsliding states – and the picture that emerges is as sad as it is most counter-intuitive for any naïve soul ready to take the working of Article 2 TEU with all its democracies and the like, on the face value. Supranational democracy, combined with the functioning internal market and strong politicization can signify the lasting stabilization of autocracy in some parts of the Union. In a situation where, in the post-Copenhagen criteria world, values, by law, are largely divorced from the *acquis*, the disquieting conclusion emerges, that a state could actually be a successful member of the EU and the Internal Market without guaranteeing the robustness of the rule of law and democratic institutions within its territory.

The Destruction of Perceived Impartiality for Nothing

The key way not to make this happen seems to be precisely through appeals to the technocratic and legalistic nature of the legitimacy of integration through law. In this, the role of the Commission is to represent the interest of the Union – not the interest of the

Hungarian government, not the interest of the EPP to stay silent in the face of the destruction of democracy in Hungary, not the interest of the majority of the Hungarian voters, should they desire to abolish Hungarian democracy – was of crucial and absolute significance. Besides ensuring that the Union as a legal-political (not outright politicized) actor would have a voice of its own, the non-political Commission also served the safeguarding of the equality of the Member States – even with no actual bias, to present the politicization of the Commission as non-problematic to the Member States with different majorities in power is very tricky – as well as the interests of those EU citizens, who, while believing in the Internal Market, could have reservations about the EPP – or any other political force, for this matter. The Commission's core place in the institutional structure of the Union is equally unclear once its politicization is on the table. Impartiality and honorable service to the benefit of the interests of all is necessarily undermined.

These are not empty concerns, as is proven by the outright inability of the EU to deal with the current rule of law crisis. At a higher level of abstraction, it is entirely unclear what we have sacrificed the principle of institutional balance and the dignity of (perceived) impartiality for. It would be an outright exaggeration to claim extra legitimacy for the Union based on the politicization of the Commission. The deep systemic gains are thus non-existent. The losses are, however, quite painfully clear, especially in the current difficult context, where politicization of the impartial means a sacrifice of core ideals the Union is built upon.

References [±]

1. ↑ Jan Klabbers, "On Babies, Bathwater and the Three Musketeers, or the Beginning of the End of European Integration", in Veijo Heiskanen & Kati Kulovesi (eds.), *Function and Future of European Law* (Helsinki: Helsinki University Press, 1999), 279.

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SUGGESTED CITATION Kochenov, Dimitry: *False Accountability, Elusive Rule of Law*, *VerfBlog*, 2018/9/11, <https://verfassungsblog.de/false-accountability-elusive-rule-of-law/>, DOI: <https://doi.org/10.17176/20180911-173723-0>.